Supreme Court, U.S.
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No. 99-139

IN THE
Supreme Court of the United States

MICHAEL JOHN WARN, *et al.*,
Petitioners,
v.

M/Y MARIDOME, her Engines, Tackle, Apparel, Furniture and Appurtenances, *in rem*; MARIDOME MARINE LIMITED, a Corporation, *in personam*, JAMES BOOS, *in personam*, and BOSTON WHALER, INC., a Corporation, *in personam*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Jones Act applies to claims asserted by foreign plaintiffs for the death of, or injury to, citizens of foreign nations suffered aboard a foreign-owned, foreign-flagged, non-commercial vessel in foreign territorial waters.

RULE 29.1 LISTING

Respondent Maridome Marine Limited has no parent company or non-wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.1 LISTING	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
REASONS FOR DENYING THE PETITION	5
I. THE NINTH CIRCUIT'S OPINION IS CONSISTENT WITH EARLIER OPINIONS OF THIS COURT AND OTHER LOWER COURTS	5
II. THE LOWER COURTS HERE CONSIDERED ALL OF THE *LAURITZEN/RHODITIS* FACTORS AND FOUND NONE SUPPORTED APPLICATION OF UNITED STATES LAW	10
III. THE NINTH CIRCUIT'S OPINION PROPERLY BALANCES THE APPLICABLE CONGRESSIONAL AND JUDICIAL POLICY CONSIDERATIONS	16
CONCLUSION	22

TABLE OF AUTHORITIES

CASES — Page

Antypas v. Cia. Maritima San Brasilio, S.A., 541 F.2d 307 (2d Cir. 1976), *cert. denied*, 429 U.S. 1098 (1977) 7
Bilyk v. VESSEL NAIR, 754 F.2d 1541 (9th Cir. 1985) 5, 17
Carbotrade S.p.A. v. Bureau Veritas, 99 F.3d 86 (2d Cir. 1996), *cert. denied*, 520 U.S. 1274 (1997) 20
Dalla v. Atlas Maritime Co., 771 F.2d 1277 (9th Cir. 1985) (per curiam) 9
DeMateos v. Texaco, Inc., 562 F.2d 895 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978) 18
Fajardo v. Tidewater, Inc., 707 F.2d 858 (5th Cir. 1983) (per curiam), *overruled in part on other grounds by In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147 (5th Cir. 1987) (en banc) 7
Fitzgerald v. Texaco, Inc., 521 F.2d 448 (2d Cir. 1975), *cert. denied sub nom. Hapag-Lloyd, A.G. v. Texaco Panama, Inc.*, 423 U.S. 1052 (1976) 5
Gonzalez v. Naviera Neptuno A.A., 832 F.2d 876 (5th Cir. 1987) 6
Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 (1970) 4, 5, 6, 11, 20
Hernandez v. Naviera Mercante, C.A., 716 F. Supp. 939 (E.D. La. 1989) 6
Ioannides v. Marika Maritime Corp., 928 F. Supp. 374 (S.D.N.Y. 1996) 7
Koke v. Philips Petroleum Co., 730 F.2d 211 (5th Cir. 1984), *overruled in part on other grounds by In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147 (5th Cir. 1987) (en banc) 20
Kukias v. Chandris Lines, Inc., 839 F.2d 860 (1st Cir. 1988) 20
Lauritzen v. Larsen, 345 U.S. 571 (1953) ..... *passim*
Pereira v. Utah Transp., Inc., 764 F.2d 686 (9th Cir. 1985), *cert. dismissed*, 475 U.S. 1040 (1986) 9

TABLE OF AUTHORITIES—Continued

Page

Phillips v. Amoco Trinidad Oil Co., 632 F.2d 82 (9th Cir. 1980), *cert. denied*, 451 U.S. 920 (1981) 9, 18

Rainbow Line, Inc. v. M/V TEQUILA, 480 F.2d 1024 (2d Cir. 1973) 21

Rojas v. Kloster Cruise, A/S, 550 So.2d 59 (Fla. Dist. Ct. App. 1989) 7, 8

Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) 5

Sigalas v. Lido Maritime, Inc., 776 F.2d 1512 (11th Cir. 1985) 18

STATUTES

46 United States Code App. Section 688 ..... 4, 19

46 United States Code Sections 761-68 4

OTHER AUTHORITIES

H. Edwin Anderson III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 TUL. MAR. L.J. 139 (1996) 16

128 CONGRESSIONAL RECORD 25422-25429 (1982) 19

David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937 (1990) 14

Frank L. Wiswall, Jr., *Flags of Convenience, in* UNITED STATES SHIPPING POLICIES AND THE WORLD MARKET 107 (William A. Lovett ed., 1996) 14, 15, 16

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BRIEF IN OPPOSITION

Respondents M/Y MARIDOME (sometimes the "Yacht"), Maridome Marine Limited ("MML"), and Captain James Boos (collectively "Respondents") respectfully request that this Court deny the Petition for Writ of Certiorari (the "Petition") seeking review of the opinion of the Court of Appeals for the Ninth Circuit in this case. That opinion is reported at 169 F.3d 625 (9th Cir. 1999). The District Court's opinion is reported at 961 F. Supp. 1357 (S.D. Cal. 1997).

STATEMENT OF THE CASE

The M/Y MARIDOME (ex STEFAREN) is a 177-foot ocean-going pleasure yacht. The Yacht is registered in the British Registry under the laws of the United Kingdom and flies the British flag. (Pet. App. A-3; Pet. App. B-59). The Yacht is owned by MML, which is a corporation organized and existing under the laws of the States of Jersey, Channel Islands. (Pet. App. A-3; Pet. App. B-59). MML purchased the Yacht in 1992.[1]

The Yacht's ultimate beneficial owner is Enrique Molina, who is a citizen and resident of Mexico. (Pet. App. A-3; Pet. App. B-59). Molina's principal business offices are in Mexico, and he has no offices or businesses in the United States. From the date of her purchase by MML, MML and Molina have used the Yacht for recreational and social purposes, sailing to different parts of the world at Molina's instructions.[2] (C.R. 118(1) at 128; C.R. 118(2) at 51-56, 59).

This suit arose out of a maritime accident that occurred on September 3, 1995 when a tender from the Yacht allided with an unlit, unmarked metal structure maintained by the Government of Greece in the Port of Poros, Greece. As a result of the allision, Petitioners' decedents Nicolas Warn and Simon Willshaw were killed, and Petitioner Richard Brooks was injured. Warn, Willshaw, and Brooks were members of the Yacht's crew at the time of

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[1] Since its incorporation, MML has fully observed the necessary corporate formalities. MML is fully capitalized, owning the Yacht, which it purchased for $22,500,000, without a mortgage.

[2] The Yacht has visited numerous countries in Europe, the South Pacific, and North, Central, and South America. During Captain Boos's captaincy, from February 1995 until the date of suit, the Yacht made seven trips to Mexico, totalling 203 days, four trips to the United States, totalling 55 days, and three trips to British ports, totalling 15 days. (Clerk's Record ("C.R.") 132 at 2-3).

the accident and subjects of the United Kingdom.[3] (Pet. App. A-4; Pet. App. B-59). Warn, Willshaw, and Brooks signed their articles of employment in Barbados, Gibraltar, and St. Martin, respectively, and not in the United States.

Immediately following the accident, on September 5, 1995, relatives of the Greek Plaintiffs filed an application for the arrest of the M/Y MARIDOME in the Court of Piraeus, Greece under the Greek Code of Civil Procedure. The Greek Plaintiffs sought security for the release of the Yacht in an amount commensurate with the amount of damages a court in the United States might award them. The Greek Court denied this request and ordered security in an amount less than the Greek Plaintiffs had sought. Respondents posted the required security, which permitted the Yacht to depart Greece.

Thereafter, the Greek Plaintiffs, joined by Warn's relatives, commenced substantive proceedings against MML, seeking damages under Greek law. MML brought an impleader action against the Greek State for indemnity due to its failure to light or mark the metal structure with which the tender allided. When the Greek Court subsequently denied the Greek State and claimants' request for an adjournment, the claimants withdrew their actions in Greece without prejudice to their reassertion in the future.

Despite the pendency of the Greek court proceedings, Petitioners filed this action against Respondents, in the United States District Court for the Southern District of California, on October 17, 1996 and caused the re-arrest

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[3] Two other individuals killed in the accident were not members of the crew and were dual citizens of Greece and Germany (the "Greek Plaintiffs"). The Greek Plaintiffs were also parties to this action originally but voluntarily dismissed their appeal from the District Court's order.

of the M/Y MARIDOME in the Port of San Diego, California. In this action, Petitioners sought recovery under the Jones Act, 46 U.S.C. App. § 688, Death on the High Seas Act ("DOHSA"), 46 U.S.C. §§ 761-68, and/or general maritime law. By order dated March 31, 1997, the District Court granted Respondents' motion to dismiss Petitioners' complaint for, *inter alia*, lack of jurisdiction under the Jones Act (i.e., the non-applicability of United States law to their claims) and *forum non conveniens*. The Ninth Circuit affirmed the District Court's dismissal of Petitioners' complaint on both choice-of-law and *forum non conveniens* grounds.

SUMMARY OF ARGUMENT

In *Lauritzen v. Larsen*, 345 U.S. 571 (1953), and *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970), this Court enunciated a flexible, multi-factor test for resolving choice-of-law issues in suits brought under the Jones Act by foreign seamen. Petitioners urge this Court, however, to replace this well-established test with a rigid, single-factor test, which would apply the law of the shipowner's base of operations, to resolve choice-of-law issues. The Petition should be denied because: (1) No conflict exists among the lower courts concerning the application of the multi-factor test, which is applied flexibly to the particular facts of each case; (2) the Ninth Circuit and the District Court held that *none* of the *Lauritzen/Rhoditis* factors, including the base of operations, supported the application of United States law; (3) the Ninth Circuit did not hold that the law of the flag was dispositive or that the base of operations could not be dispositive in the appropriate case; and (4) no commercial policy, foreign policy, federalism, or other policy concern is implicated by the "Question Presented" in the Petition.

REASONS FOR DENYING THE PETITION

I. THE NINTH CIRCUIT'S OPINION IS CONSISTENT WITH EARLIER OPINIONS OF THIS COURT AND OTHER LOWER COURTS.

In *Lauritzen v. Larsen*, 345 U.S. 571, 583-92 (1953), and *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 308-09 (1970), this Court formulated a flexible, eight-factor test for determining whether United States law applies to the claims of foreign seamen. The factors to be weighed are: (1) place of the wrongful act; (2) law of the vessel's flag; (3) allegiance or domicile of the injured party; (4) allegiance of the shipowner; (5) place of the contract; (6) inaccessibility of the foreign forum; (7) law of the forum; and (8) base of operations of the shipowner. Although *Lauritzen* was a Jones Act case, this Court has extended its test to all cases arising under general maritime law. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 381-84 (1959). The lower federal courts have held that the *Lauritzen/Rhoditis* test applies to DOHSA actions as well. *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 454 (2d Cir. 1975), *cert. denied sub nom. Hapag-Lloyd, A.G. v. Texaco Panama, Inc.*, 423 U.S. 1052 (1976).

In holding that foreign law governed Petitioners' claims, the Ninth Circuit weighed all of the *Lauritzen/Rhoditis* factors. The Court of Appeals did not rely solely upon the law of the Yacht's flag or hold that "the flag presumptively controls," as Petitioners suggest. (Pet. at 24). Rather, the Ninth Circuit recognized simply that the law of the flag was the only factor it had previously considered "*potentially* dispositive . . ., '*unless* other factors point decidedly in a different direction.'" (Pet. App. B-66 (*quoting Bilyk v. VESSEL NAIR*, 754 F.2d 1541, 1545 (9th Cir. 1985) (emphasis added)). Here, the

Ninth Circuit found, however, that "the law of the flag *and a majority of the other factors* point decidedly in the same direction . . . [i.e., toward the application of foreign law]." (Pet. App. B-66 (emphasis added); *see also* Pet. App. B-64). The Ninth Circuit was plainly correct in so holding.

The Ninth Circuit's opinion is entirely consistent with this Court's holding in *Rhoditis*. In *Rhoditis*, this Court held only that "the shipowner's *base of operations* is another factor of importance in determining whether the Jones Act is applicable; and there well may be others." 398 U.S. at 309 (underlining added). *Rhoditis* did not hold that the base of operations was *the most important* factor. As the District Court noted here, the "Ninth Circuit has consistently weighed all eight of [the *Lauritzen/Rhoditis*] factors, according the most weight to the law of the flag, the shipowner's base of operations, and the citizenship of the injured seamen." (Pet. App. A-25 & n.6 (citing cases)). The lower courts' opinions properly considered the *Lauritzen/Rhoditis* factors in light of this Court's precedent.

The Ninth Circuit's opinion is also in accord with decisions of other circuit courts, including those cited in the Petition. (*See* Pet. at 25-26). As Petitioners themselves admit, the rule in other circuits is only that the base of operations factor "*may* be decisive." (*Id.* at 25 (emphasis added)). In *Gonzalez v. Naviera Neptuno A.A.*, for example, the Fifth Circuit stated that "the base of operations of the defendant *may sometimes* be decisive." 832 F.2d 876, 880 (5th Cir. 1987) (emphasis added). The Fifth Circuit applied foreign law to the claims, in *Gonzalez*, because the defendant, the vessel's flag, and the base of operations were all foreign. *Id.* at 880-81. Similarly, the district court concluded in *Hernandez v. Naviera Mercante, C.A.*, 716 F. Supp. 939, 943

(E.D. La. 1989), that "based upon the Fifth Circuit law, the two most important factors, in a choice of law question, are the flag of the vessel and the vessel owner's base of operations."

The Second Circuit's holding in *Antypas v. Cia. Maritima San Brasilio, S.A.*, 541 F.2d 307 (2d Cir. 1976), *cert. denied*, 429 U.S. 1098 (1977), upon which Petitioners also rely, is not to the contrary. (*See* Pet. at 25). *Antypas* involved a factual situation very different from the present case. There, the seaman was injured aboard a commercial vessel owned in part by Americans and engaged in a liner service between United States and foreign ports, which was operated by an American company. *Id.* at 310. Accordingly, the Second Circuit held only that under the facts of that case those contacts with the United States were "substantial and predominate over such factors as the ship's flag, the place of incorporation of the shipowner, and the seaman's nationality." *Id.* The Second Circuit did not announce a general rule elevating the base of operations factor above the other *Lauritzen/Rhoditis* factors in all cases.[4]

The decision by a Florida Court of Appeals in *Rojas v. Kloster Cruise, A/S*, 550 So.2d 59 (Fla. Dist. Ct. App. 1989), also cited by Petitioners, presents another case that is plainly distinguishable on its facts. (Pet. at 25-26). In that case, the shipowner was a Norwegian company that maintained its principal place of business in Miami,

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[4] Both the Fifth Circuit and district courts within the Second Circuit have held that, under the facts of a particular case, other factors may outweigh even a United States base of operations. *See, e.g., Fajardo v. Tidewater, Inc.*, 707 F.2d 858, 861-62 (5th Cir. 1983) (per curiam), *overruled in part on other grounds by In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1163 n.25 (5th Cir. 1987) (en banc); *Ioannides v. Marika Maritime Corp.*, 928 F. Supp. 374, 380 (S.D.N.Y. 1996).

Florida, was partly owned by American citizens, and was authorized to do business in Florida. *Id.* at 60 n.2. The shipowners' cruise ship operations accounted for all of its more than $300,000,000 in revenue and were largely based in Miami, which was the home port of its ships and from where all of its cruises sailed. *Id.* As the *Rojas* Court concluded, "it would be hard to imagine a commercial situation in which American interests, to the virtual exclusion of any others, so completely control both the daily commercial operations and the long-term prosperity of the defendant and its vessels. . . . [T]he operation of the defendant's liner is economically indistinguishable from that of a hypothetical United States flag vessel owned by United States interests." *Id.* at 64.

While these facts may have supported the application of United States law in that case, they are very different from the facts in the present case and highlight the difference between a commercial maritime operation and, as here, the use of a recreational vessel. In fact, all of the cases cited by Petitioners demonstrate the importance of the facts of the particular case to the *Lauritzen/Rhoditis* analysis. As this Court recognized in addressing the "superficial" variance in the case law in *Lauritzen*, 345 U.S. at 573 & n.3, "[n]o two of these cases present exactly the same basis for application of American law and their contrary results do not necessarily mean inconsistency. But they illustrate different considerations which influence choice of law in maritime tort cases." The operation of the M/Y MARIDOME, a pleasure yacht, does not present the same facts or concerns as did the large commercial maritime operations involved in the cases Petitioners cite.[5] Regardless, unlike Petitioners' proposed

[5] Accordingly, Petitioners are wrong in asserting that the result in this case would necessarily have been different if they had re-

test, the present test gives courts the flexibility to deal with such disparate factual situations by balancing all eight *Lauritzen/Rhoditis* factors.

Accordingly, the Ninth Circuit, like the Second and Fifth Circuits, has weighed the base of operations factor more heavily than other factors, including the law of the flag, where, unlike here, the facts of the case required. In *Dalla v. Atlas Maritime Co.*, 771 F.2d 1277 (9th Cir. 1985) (per curiam), for example, the Ninth Circuit affirmed the application of United States law to the claims of a foreign seaman. The Ninth Circuit held that:

> The [district] court concluded that the *Lauritzen* and *Rhoditis* factors militated in favor of starting [sic] a Jones Act claim not only because the vessel's base of operations is in the United States but also because the vessel's owners were apparently United States nationals [i.e., the apparent reason the district court determined the base of operations was in the United States] and the injury occurred within the United States. In the context of the facts of this case, the trial judge correctly accorded significant weight to those factors and comparatively less weight to the vessel's [foreign] flag and to the nationality of the injured party and the vessel's operator.

Id. at 1278-79 (distinguishing *Pereira v. Utah Transp., Inc.*, 764 F.2d 686 (9th Cir. 1985), *cert. dismissed*, 475 U.S. 1040 (1986), which found the base of operations was not dispositive under different facts). The Ninth Circuit also declined to follow the law of the flag in *Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82 (9th Cir. 1980), *cert. denied*, 451 U.S. 920 (1981). Petitioners are simply wrong in contending that the Ninth Circuit mechanically applies the law of the flag.

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arrested the M/Y MARIDOME in a different jurisdiction. (*See* Pet. at 26).

II. THE LOWER COURTS HERE CONSIDERED ALL OF THE *LAURITZEN/RHODITIS* FACTORS AND FOUND NONE SUPPORTED APPLICATION OF UNITED STATES LAW.

The "Question Presented" in the Petition is whether a court can give greater weight in conducting the *Lauritzen/Rhoditis* choice-of-law analysis to a vessel's flag of convenience than the shipowner's United States base of operations. The Petition makes clear, however, that Petitioners are really asking this Court to hold that the base of operations is *the* dispositive factor in all cases. In doing so, the Petition rests upon three erroneous presumptions, none of which finds any support in either the decisions below or the record.

First, contrary to Petitioners' suggestion (Pet. at 21), the Ninth Circuit did not ignore the importance of the shipowner's base of operations under the *Lauritzen/Rhoditis* analysis. Instead, the Court of Appeals held that:

> Here, *all* of the *relevant Lauritzen* factors point toward the application of foreign maritime law, rather than the Jones Act: the accident occurred in Greek coastal waters; the Maridome flies a British flag; none of the injured or deceased parties are or were American citizens or domiciliaries; the shipowner is a Mexican citizen and domiciliary; none of the injured or deceased sailors's [sic] employment contracts were signed in the United States; and Greece provides an accessible forum, as evidenced by the action filed in that forum.

(Pet. App. B-64, 65 (emphasis added, footnote omitted); *see also* Pet. App. A-31, 34). The Ninth Circuit concluded, therefore, that "[e]ven assuming that the Maridome's base of operations was in the United States, the weight of the *Lauritzen* factors indicates that foreign law

is applicable rather than the Jones Act."[6] (Pet. App. B-66 (footnote omitted)).

Moreover, the Ninth Circuit did not disregard Petitioners' claim that the base of operations factor alone was sufficient to justify application of the Jones Act, i.e., was dispositive. (Pet. App. B-65). Rather, the Court of Appeals expressly noted that:

> We do not decide today that a United States base of operations alone cannot ever be dispositive; we simply conclude that the factors here pointing toward application of foreign law outweigh the sole factor arguably militating in favor of applying the Jones Act.

(Pet. App. B-66). Importantly, both lower courts also recognized that the base of operations factor was entitled to less weight in a case such as this one, involving a non-commercial, recreational vessel. (Pet. App. A-26 n.6; Pet. App. B-64 (discussing "relevant" factors)). Such a vessel does not derive any profits from any base of operations it may have and, thus, does not compete with United States companies in the manner addressed in *Rhoditis*, 398 U.S. at 310. Petitioners ignored this distinction before the lower courts as they do now in their Petition.

Second, neither of the lower courts found that either MML or the Yacht maintained a base of operations in the United States. As discussed above, the Ninth Circuit reasoned that, regardless of whether MML had a United States base of operations, the United States did not have a sufficient interest for its law to govern Petitioners'

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[6] The District Court also recognized the importance of the base of operations factor in the *Lauritzen/Rhoditis* test even though it too found that the weight of the other factors favored the application of foreign law in this case. (Pet. App. A-24, 25).

claims. The Ninth Circuit did not hold, however, that any such United States base of operations existed. Consequently, the Ninth Circuit's opinion does not provide either a factual or legal basis for addressing the "Question Presented" by the Petition.

Indeed, the District Court specifically held that it could *not* find that MML and/or the Yacht had a base of operations in the United States. The District Court explained that "at the time of the accident, none of the Maridome's operations were being managed out of the United States." (Pet. App. A-32). Even when the Court "examine[d] the shipowner's base of operations for the 18 months prior to the accident, the Court [could not] make a finding that the Maridome's base of operations was in the United States." (Pet. App. A-33). The District Court also noted that "[Petitioners] argue that the place where day-to-day operations are managed is the base of operations. If this is true, then the base of operations is onboard the ship itself [sic] Captain Boos managed the dayto-day [sic] activities of the crew, provisioning the ship, deciding how to sail where Molina directed, and maintaining daily account ledgers." (Pet. App. A-34). Thus, not even the base of operations—the one factor upon which Petitioners rely—supports application of the Jones Act.

Contrary to Petitioners' "Statement of the Case," the record supports the holding that MML and the Yacht had no United States base of operations. (Pet. at 6-12). Petitioners rest their entire argument that a United States base of operations existed upon the activities of Peter Lee from April 1994 to August 1995.[7] MML fired Lee in July 1995 (over a month before the accident) and required him to terminate his relationship with the Yacht

[7] Importantly, although Lee was a United States resident, he was a New Zealand citizen.

by August 15, 1995.[8] Even before his firing, however, Lee's role had been diminishing since the hiring of Captain Boos in February 1995.

Captain Boos was responsible for obtaining food, water, fuel, other provisions, and cruising permits for the Yacht. Captain Boos also did all of the hiring and firing of crew aboard the Yacht. In performing these duties, Captain Boos answered only to MML representatives *in Mexico*, and not to Lee. Thus, even Lee conceded that he had never controlled Captain Boos with respect to such things as hirings and that, in 1995, *all* of his management activities became subject to approval by people *in Mexico*. (C.R. 118(4) at 97, 181). Of course, as captain of the Yacht, Captain Boos also directed and controlled the navigation of the Yacht to the various destinations chosen by Molina *in Mexico*.

Lee's primary responsibilities after moving ashore in March 1994 were simply to collect and forward the Yacht's mail, complete the accountings by adding any shoreside expenses, and send the accountings to MML's John Falb in Mexico for approval and funding. In fact, the financial and accounting activities for the operation of the Yacht were carried out principally aboard the Yacht and in Mexico at MML's offices. The Yacht's purser, Captain Boos's wife, prepared the monthly accountings and forwarded them to MML in Mexico for approval. When the accounts were approved, MML transferred funds from Mexico into MML's NationsBank account. All the money used for the operation of the Yacht came ultimately, however, from Molina's business

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[8] On August 15, 1995, Lee confirmed his termination and that he had "advised the various companies that I have been dealing with that I am *no longer representing the yacht* . . . ." (C.R. 128 at 7 (emphasis added)).

activities and bank accounts in Mexico.[9] (C.R. 118(1) at 105; C.R. 118(2) at 59-60; C.R. 120, Exh. 19). The record plainly supports the District Court's findings that the day-to-day operation of the Yacht occurred aboard the Yacht, Lee handled only month-to-month matters (for a limited period of time), and Molina, in Mexico, made the ultimate decisions about how to operate the Yacht. (Pet. App. A-33).

Third, neither of the lower courts determined that the Yacht's British flag was a "flag of convenience." Both lower courts recognized that the Yacht flew the British flag, and neither adopted Petitioners' argument that the flag was a flag of convenience. (Pet. App. A-23; Pet. App. B-64, 66). As those courts implicitly determined, such a characterization of the Yacht's British flag is inaccurate.

The term "flag of convenience" applies to

> those flag administrations which both grant nationality to foreign-owned ships *and* have in place sufficiently laissez-faire policies—particularly with regard to nationality and union affiliation of seafarers—to ensure that these ships are able to operate at significantly lower costs than those flying the "traditional" flags of the developed States.

Frank L. Wiswall, Jr., *Flags of Convenience, in* UNITED STATES SHIPPING POLICIES AND THE WORLD MARKET 107, 108 (William A. Lovett ed., 1996) (emphasis added). *See also* David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions,* 68 TEX.

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[9] Just as before the lower courts, Petitioners claim, without any support from the record, that MML funded its NationsBank account from Molina's assets in the United States. This allegation is simply incorrect.

L. REV. 937, 939 n.12 (1990) ("A 'flag of convenience' refers to flying the flag of a country in which an owner registers a ship to avoid the labor and safety regulations, fees, and taxes imposed on ships registered in the United States."). Contrary to Petitioners' contention, foreign ownership alone does not necessarily mark a vessel's flag as one of convenience.[10] (Pet. at 23-24).

Here, the Ninth Circuit implicitly rejected Petitioners' argument that the Yacht had no contacts with the United Kingdom and, therefore, the Yacht's flag was one of convenience. The Ninth Circuit noted that a British Channel Islands company (MML) owned the Yacht, the Yacht's hull and protection and indemnity insurance were placed with insurers in the United Kingdom, and the Petitioners represented British sailors "whose contracts of employment were apparently signed within the British Commonwealth."[11] (Pet. App. B-66). In addition, the Yacht's classification was maintained with Lloyd's Register, a British classification society, and the Yacht had complied with all of the regulatory requirements of the British Department of Transportation. Finally, of the 65 crewmembers who served aboard the Yacht from March 1993 to December 1996, approximately 40 percent were sub-

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[10] For example, as one author has commented, "the United States, in granting U.S. nationality and Flag to 11 Kuwaiti-owned ships in 1987 during the 'tanker war' in the Gulf, was not referred to as an FoC [i.e., flag of convenience] because the legal and economic strictures imposed upon U.S.-Flag shipping ensured that these foreign-owned ships could not operate at significantly lower costs than other U.S.-Flag ships." Wiswall, *Flags of Convenience* at 108-09.

[11] Actually, only two of the seamen signed their articles of employment in British Commonwealth territories (Barbados and Gibraltar). The third signed his articles in St. Martin, which is not a British Commonwealth territory.

jects of the United Kingdom—more than from any other single country and over three times as many as from the United States.

Regardless, the British flag has never been considered a flag of convenience. The United Kingdom is a traditional maritime nation, which does not maintain an open registry.[12] *See generally* H. Edwin Anderson III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives,* 21 TUL. MAR. L.J. 139, 140 n.5, 151-58 (1996). Research has revealed no United States court decision that has ever recognized the British flag as a flag of convenience. Moreover, as the various definitions of this term make clear, it has significance primarily, if not entirely, in the sphere of commercial, not recreational, shipping.

III. THE NINTH CIRCUIT'S OPINION PROPERLY BALANCES THE APPLICABLE CONGRESSIONAL AND JUDICIAL POLICY CONSIDERATIONS.

This case involves claims on behalf of foreign seamen against a foreign pleasure yacht and its foreign owner, which do not implicate any commercial policy, foreign policy, federalism, or other policy concerns of the United States. Although Petitioners contend that important policies require review, they cite no cases from any court in which the Jones Act has been applied to foreign seamen serving aboard a foreign, *non-commercial* vessel, such as the M/Y MARIDOME. (Pet. at 27-29). Likewise, Petitioners cite no cases that have extended the liberal policies underlying the Jones Act to such seamen.

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12 Notable flags of convenience are: The Bahamas, Barbados, Belize, Cyprus, Honduras, Liberia, Malta, Marshall Islands, Mauritius, Panama, St. Vincent & The Grenadines, Sri Lanka, and Vanuatu. Wiswall, *Flags of Convenience* at 109 & n.6.

Rather, Petitioners contend initially that the Jones Act should be applied to their claims because Respondents have supposedly accepted "the benefits of basing their operations in the U.S." (*Id.* at 27). In support of this argument, Petitioners rely solely upon language from the District Court's opinion addressing whether MML had sufficient *minimum contacts* with the United States for the court to exercise personal jurisdiction over MML. (*Id.*) The *Lauritzen/Rhoditis* test is not, however, a minimum contacts test. *Bilyk,* 754 F.2d at 1544. Regardless, the District Court found further that MML's various contacts with the United States did not establish a base of operations here sufficient for application of the Jones Act even if they did establish personal jurisdiction over MML. (Pet. App. A-32, 33, 34).

This Court rejected reasoning similar to Petitioners' in *Lauritzen*:

> Respondent places great stress upon the assertion that petitioner's commerce and contacts with the ports of the United States are frequent and regular, as the basis for applying our statutes to incidents aboard his ships. But the virtue and utility of seaborne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea.

345 U.S. at 581. The fact that the M/Y MARIDOME may have had some contacts with the United States, such as buying goods and services or receiving mail here, does not provide a basis for applying United States law. In *Lauritzen* and *Rhoditis,* this Court outlined the factors to be

considered in determining whether a shipowner's and vessel's contacts with the United States require the application of the Jones Act, as opposed to the exercise of personal jurisdiction. As the lower courts properly held, those contacts are not present here.

Petitioners' second policy rationale for applying the Jones Act to their claims is equally unavailing. Petitioners suggest that this Court should grant review because of the supposed interests of American seamen—none of whom was involved in the accident at issue. (Pet. at 27-28). Whether United States law would have applied to the claims of an American seaman injured or killed in this accident is both unknown and irrelevant. The federal courts have expressly rejected such calls for the application of United States law to the claims of foreign seamen based upon the treatment that might have been accorded to an American seaman in the same situation:

> We know of no authority for the view that foreign nationals may predicate a right to have American law applied on the rights of similarly situated American citizens. The suggestion that one follows from another is another "variety of social jingoism, which presumes that the 'liberal purposes' of American law must be exported to wherever our multinational corporations are permitted to do business."

Phillips, 632 F.2d at 89 (citation omitted). *See also Sigalas v. Lido Maritime, Inc.*, 776 F.2d 1512, 1518-19 (11th Cir. 1985); *DeMateos v. Texaco, Inc.*, 562 F.2d 895, 902 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978).

Moreover, despite its broad language, "courts have never applied the Jones Act as broadly as a literal reading of it would require." *Phillips*, 682 F.2d at 84. Instead, as this Court has held, the Jones Act applies "only to

areas and transactions in which American law would be considered operative under prevalent doctrines of international law." *Lauritzen*, 345 U.S. at 577. It was, indeed, because the Jones Act does not, in fact, apply to "any seaman" that this Court enunciated the applicable choice-of-law factors to be considered in evaluating the claims of foreign seamen under the Jones Act in *Lauritzen* and *Rhoditis*.

Petitioners' citation to the 1982 amendment to the Jones Act (adding subsection (b) to 46 U.S.C. App. § 688) as support for this supposed policy rationale does not withstand scrutiny. (Pet. at 28). Although in debating that amendment some members of Congress expressed their concern that it would result in the loss of American jobs, Congress rejected this notion in passing the amendment. In fact, a number of Congressmen specifically refuted the idea that the amendment would harm American workers in any way. 128 CONG. REC. 25423 (statement of Rep. Biaggi), 25424 (statement of Rep. Breaux), 25426 (statement of Rep. Boggs), 25427 (statement of Rep. Biaggi) (1982). Thus, the passage of the 1982 amendment, which rejected Petitioners' reasoning, in no way supports review in the present case.

Likewise, the fact that the amendment was limited to foreign seamen employed on the continental shelf of foreign nations in the oil and gas industry does not reflect any policy necessitating review in this case. The House of Representatives' debate makes clear that the amendment was tailored to address only that specific situation and to codify the courts' prior treatment of the claims of such workers. *Id.* at 25422 (statement of Rep. Biaggi). Congress left the remainder of cases involving foreign seamen to be decided by the courts under the multi-factor *Lauritzen/Rhoditis* analysis.

Petitioners ask this Court to review the present case, however, so as to replace this Court's flexible, multi-factor choice-of-law test with a single-factor base of operations test. In doing so, Petitioners demonstrate that their primary purpose is changing the result in this case and not in protecting any policy concerns. The strength of the present *Lauritzen/Rhoditis* test is that by weighing its eight factors, as the Ninth Circuit did, courts are able to address choice-of-law questions in maritime cases presenting various factual scenarios. As this Court noted in *Rhoditis*, the "*Lauritzen* test, however, is not a mechanical one. . . . The significance of one or more factors must be considered in light of the national interest served by the assertion of Jones Act jurisdiction." 398 U.S. at 308-09 (citations and footnote omitted).

The lower courts, such as the Ninth Circuit here, have followed this Court's instruction in *Rhoditis* in weighing the *Lauritzen/Rhoditis* factors in a flexible manner designed to address the peculiar factual and policy situations presented by different cases. *Compare Kukias v. Chandris Lines, Inc.*, 839 F.2d 860, 862-64 (1st Cir. 1988) (place of the wrongful act was not a significant factor and other factors outweighed alleged United States base of operations where seaman was injured aboard cruise ship) and *Koke v. Philips Petroleum Co.*, 730 F.2d 211, 218-20 (5th Cir. 1984), *overruled in part on other grounds by In re Air Crash*, 821 F.2d at 1163 n.25 (place of injury and seamen's allegiance outweighed United States ownership of vessel and possible base of operations where seamen were injured aboard semi-submersible rig). The flexibility of the *Lauritzen/Rhoditis* test has also permitted its application beyond the maritime personal injury/wrongful death realm to other maritime actions as well. *See, e.g., Carbotrade S.p.A. v. Bu-*

reau Veritas, 99 F.3d 86, 91 (2d Cir. 1996), *cert. denied*, 520 U.S. 1274 (1997) (misrepresentation); *Rainbow Line, Inc. v. M/V TEQUILA*, 480 F.2d 1024, 1026 (2d Cir. 1973) (maritime liens).

Ultimately, it is apparent that the Ninth Circuit properly applied and evaluated the eight *Lauritzen/Rhoditis* factors in a manner consistent with this Court's decisions and those of other circuits. No court has adopted the inflexible approach Petitioners urge this Court to adopt. The *Lauritzen/Rhoditis* test requires no adjustment, in part, because it already permits courts to weigh factors, such as the base of operations, more heavily when appropriate. Here, however, as in *Lauritzen*, the facts simply provide "no justification for interpreting the Jones Act to intervene between foreigners and their own law because of acts on a foreign ship not in our waters." *Lauritzen*, 345 U.S. at 593.

CONCLUSION

Petitioners have failed to demonstrate any conflict among the lower federal or state courts on the application of the *Lauritzen/Rhoditis* test to warrant review here. The cases reveal, instead, that the courts consider all of the factors, according different weight to different factors depending upon the facts of the case. Moreover, neither of the lower courts here found that any of the *Lauritzen/Rhoditis* factors, including Respondents' base of operations, supported the application of United States law to Petitioners' claims. Finally, Petitioners have cited no commercial policy, foreign policy, federalism, or other policy concern that requires revamping this Court's choice-of-law test. Accordingly, Respondents respectfully request that the Court deny the Petition.

Respectfully submitted,

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